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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-145

ADRON P. BRAINERD,

Petitioner,

vs.

WARREN W. BEAL and ROBERT O. DUNN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The petitioner Adron P. Brainerd respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 20, 1974 with a rehearing denied on June 19, 1974.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears at pages 4 through 6 of the Appendix which is attached hereto behind the petition. The opinion rendered by the District Court for the Northern District of Illinois, Eastern Division contains nothing related to this petition.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered on May 20, 1974 with rehearing denied on June 19, 1974. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Can a docket entry made by the clerk of the District Court be "impeached", or explained?

STATEMENT OF THE CASE

The case in the District Court dealt with questions relating to a bill of exchange under the Federal Banking Act. This petition does not concern the subject matter of the District Court decision. Instead, this petition involves a question regarding whether the appeal in the Seventh Circuit Court of Appeals was timely filed and that issue revolves around the docket entries by the clerk and whether the clerk is allowed by affidavit to explain, clarify or impeach his own docket entries.

The District Court Judge rendered his order on January 30, 1973. The order was transmitted to the clerk's office for entry in the docket. There is no question that the date of the clerk's physical entry of the order in the docket starts the thirty day period in which an appeal may be filed. The clerk's docket entry reflecting the judge's order appears in full on the bottom of page 1 of the Appendix. Its form is as follows:

Date	Proceedings	Date Order or Judgment Noted
1-30-73	. . . Order plaintiff's amended complaint is dismissed . . . Mailed Notices 2-1-73	(left blank)

The notice of appeal was filed on March 2, 1973. That filing would only be timely if the order was entered in the docket by the clerk on or after January 31, 1973. Months after the notice of appeal was filed opposing counsel filed a motion to dismiss on the grounds that the

appeal was not timely filed. Certifications from the District Court clerk's office were filed showing that under normal practices in that office the docketing took place at a time which would have made the filing of the notice of appeal timely. The Court of Appeals denied the motion to dismiss and denied a motion for reconsideration on that issue. Then after taking the case under advisement that court reversed itself and dismissed the case on the supposed ground that the notice of appeal was not timely filed and denied a rehearing. The Court of Appeals held that the "1-30-73" date on the docket entry governed though no date appeared under the heading "Date Order or Judgment Noted". Affidavits from the clerk which appear on pages 2 and 3 of the Appendix had been submitted to the Court of Appeals under court seal stating that the 1-30-73 date reflected only the date that the judge rendered his order and the 2-1-73 date of mailing also reflected the date that the order was entered in the docket which would have caused the notice of appeal to have been timely filed. However, the Court of Appeals refused to consider these certifications and affidavits on the ground that "the district court's docket cannot be impeached". The order dismissing the appeal was issued as an "unpublished order not to be cited per Circuit Court Rule" and then the court reversed itself because it felt its decision was important and it ordered it to be published.

REASONS FOR GRANTING THE WRIT

I.

THE OPINION BELOW WHICH FORBIDS ANYONE INCLUDING THE DISTRICT COURT CLERK FROM EXPLAINING THE DISTRICT COURT CLERK'S DOCKET ENTRIES IS SUCH AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The foundation of the decision of the Court of Appeals in dismissing the appeal was that the District Court's docket entries cannot be "impeached" or explained even by the neutral clerk who made them. In this case the affidavits of the clerk at pages 2 and 3 of the Appendix show that the 1-30-73 date in the docket entry which was relied on by the Court of Appeals was the date the judge rendered his order, and not the date on which the docket entry was made and go on to show that under the clerk's procedures at that time, the appeal was timely filed. The Court of Appeals holds that the docket entries of the district court clerk are sacred and not subject to question or clarification. This Court in its supervisory capacity cannot tolerate a decision which holds that the facts of what occurred in the district court clerk's office are irrelevant since a mistake or ambiguity in the district court docket are sacrosanct and that ambiguity governs clarification. This Court cannot permit the record system under its supervision to subvert facts to fiction replacing justice with contrived blindness. A clerk of a court certainly should be permitted to clarify his records to let truth prevail. This Court in its supervisory function must not let this opinion by the Seventh Circuit stand. This Court should either summarily reverse that opinion or should grant this writ and permit argument of the merits.

II.

THIS WRIT SHOULD BE GRANTED TO RESOLVE A CONFLICT CREATED BY THE SEVENTH CIRCUIT WITH DECISIONS OF OTHER CIRCUITS.

The Seventh Circuit's decision conflicts with decisions of other circuits. The Third Circuit in *Neely* v. *Merchants Trust Co. of Red Bank, N.J.*, 110 F.2d 525 (1940), cert. denied 311 U.S. 705, permits the questioning, impeaching and clarification of a district court clerk's docket entries based on clerks' affidavits. The Ninth Circuit in *Colvin* v. *Woods*, 180 F.2d 893 (second case) at 894 (1950) permits the disregard of a date of entry of an order stated in the docket in favor of the date when the clerk actually made the entry. The First Circuit in *Burke* v. *Commissioner of Internal Revenue*, 301 F.2d 903 (1962) impeached a docket entry.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

RICHARD M. KATES
33 N. LaSalle Street
Chicago, Illinois 60602

Counsel for Petitioner

APPENDIX

p. 1

DATE	PROCEEDINGS	Date Order or Judgment No.
11-30-72	Filed Notice of Motion and motion to file amended complaint	
11-30-72	Order leave to plaintiff to file instanter amended complaint. Defendants to answer or otherwise plead within 20 days. Order cause reset from December 6, 1972 to January 3, 1973 for report on status-Will, J.	
	Mailed notices 12-1-72 P	
11-30-72	Filed Amended Complaint P	
12-18-72	Filed Motion of Warren W. Beal and Robert O. Dunn to dismiss amended complaint and Exhibits P	
12-26-72	Filed Brief in support of defendants motion to dismiss amended complaint P	
1-3-73	Order cause continued to January 26, 1973 at 10:00 a.m. for report on status-Will, J.	
	Mailed notices 1-5-73 P	
1-5-73	Filed Answer of plaintiff to brief and motion of defendant to dismiss amended complaint P	
1-9-73	Filed Reply Brief in support of defendants motion to dismiss amended complaint P	
1-24-73	On Courts own motion order cause reset from January 26, 1973 to January 30, 1973 at 10:00 a.m. for report on status-Will, J.	
	Mailed notices 1-26-73 P	
1-30-73	Order defendants' motion to dismiss plaintiff's amended complaint is granted. Order plaintiff's amended complaint is dismissed (Court's Memorandum opinion will be filed within short date)-Will,J. (JS6)	
	Mailed Notices 2-1-73 gs	

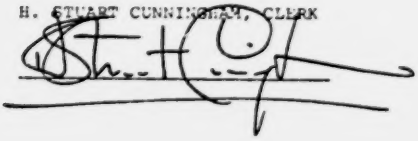
CERTIFICATION

UNITED STATES OF AMERICA)
) SS
NORTHERN DISTRICT OF ILLINOIS)

I, H. Stuart Cunningham, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that the date entered into the left hand docket column of the docket sheet immediately adjacent to the item docketed indicates (a) in the case of an order, memorandum opinion or ruling of a judge, the date the judge signed such ruling, or (b) in the case of pleadings filed with the clerk, the date such pleadings were filed. The date the item was actually entered onto the docket, that is the physical typing of the entry, is generally the same as the date indicated on the docket for the mailing of notices.

IN TESTIMONY WHEREOF, I have hereto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 12th day of July, 1973.

H. STUART CUNNINGHAM, CLERK



UNITED STATES OF AMERICA)
; SS
NORTHERN DISTRICT OF ILLINOIS)

CERTIFICATE AND AFFIDAVIT

I, H. Stuart Cunningham, Clerk of the United States District Court for the Northern District of Illinois do hereby certify and swear that

1) The docket in the case Adron P. Brainerd -vs- Warren W. Beal, et al., Civil Action 72 C 1571 contains the following entry:

"1-30-73 Order Defendants' motion to dismiss plaintiff's amended complaint is granted. Order plaintiff's amended complaint is dismissed (Court's memorandum opinion will be filed within short date) - Will, J. (JS6) Mailed notices 2-1-73 gs" ;

2) In accordance with the docketing procedures in effect in the Office of the Clerk at the time the date "1-30-73" represents the date on which the Honorable Hubert L. Will entered the order referred to in the docket;

3) In accordance with the docketing procedures in effect in the Office of the Clerk at the time the date indicated for the mailing of notices, i.e. 2-1-73, is the date on which the order was entered on the docket;

4) The practice of using the date of entry of an order by the judge as the date of entry of that order on the docket was one of long standing in the Office of the Clerk;

5) The present practice of the Office of the Clerk is to show on the docket the day an order is actually entered onto the docket regardless of the date it was entered by the judge.

IN TESTIMONY WHEREOF, I have hereto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois this 29th day of May 1974.

H. Stuart Cunningham

SWORN AND SUBSCRIBED before me this 29th day of May 1974.

In the
United States Court of Appeals
For the Seventh Circuit

No. 73-1382 September Term, 1973 January Session, 1974

ADRON P. BRAINERD,
Plaintiff-Appellant,
v.
WARREN W. BEAL and ROBERT O. DUNN,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 72 C 1571
HUBERT L. WILL, *Judge.*

ARGUED FEBRUARY 11, 1974 — DECIDED MAY 20, 1974

Before SWYGERT, *Chief Judge*, KILEY, *Senior Circuit Judge*, and CUMMINGS, *Circuit Judge*.

PER CURIAM. Plaintiff Brainerd has appealed from a judgment dismissing his amended complaint for failure to state a claim upon which relief could be granted, and, in the alternative, because it was barred by the Illinois statute of limitations. We dismiss the appeal.

The complaint was based upon alleged violations by defendant bank officers of 18 U.S.C. §1005 through issuance of a cashier's check without authorization, and the making of false entries in bank records with intent to defraud. These violations would, if proved, render the

defendants individually liable for damages under 12 U.S.C. §503.[1]

The district court's judgment was rendered on January 30, 1973, and the docket sheet prepared by the clerk of the court lists entry of that judgment on January 30, 1973. The notice of appeal stated it was "from the order dismissing the amended complaint entered in this action on the 30th day of January, 1973." However, the notice was not filed until March 2, 1973, a date not within thirty days from January 30. Rule 4(a) Federal Rules of Appellate Procedure. We hold that Brainerd's notice of appeal was not timely filed and that we are therefore without jurisdiction to entertain the appeal. Rule 3(a) Federal Rules of Appellate Procedure: *Washington v. United States*, 450 F.2d 945 (3rd Cir. 1971); *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 303 F.2d 609 (7th Cir. 1962).[2]

Brainerd misplaces his reliance upon unsworn affidavits signed by a deputy clerk of the district court stating that, based on "normal business practices," an entry dated January 30 would have been made on January 31 or February 1. The affidavits contradict the docket, as certified to us by the clerk of the court, which stated: "I, H. Stuart Cunningham, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify . . . that the documents submitted . . . are the original papers filed and *entered of record in my office on the dates designated in the List of Documents* . . . ." (Emphasis added.) Furthermore, the district court's docket cannot be impeached by affidavit. *Wall v. United*

[1] §503. Liability of directors and officers of member banks.
If the directors or officers of any member bank shall knowingly violate or permit any of the agents, officers, or directors of any member bank to violate any of the provisions of this section or regulations of the board made under authority thereof, or any of the provisions of sections 217, 218, 219, 220, 655, 1005, 1014, 1906, or 1909 of Title 18, every director and officer participating in or assenting to such violation shall be held liable in his personal and individual capacity for all damages which the member bank, its shareholders, or any other persons shall have sustained in consequence of such violations. As amended Sept. 3, 1954, c. 1263, §28, 68 Stat. 1236.

[2] One judge of this panel, sitting as motion judge, twice denied, prior to oral argument, defendants' motions to dismiss the appeal as untimely filed. However, the court's ruling that it has jurisdiction is always subject to reconsideration.

States, 97 F.2d 672 (10th Cir. 1938), *cert. denied*, 305 U.S. 632 (1938). Accordingly, we disregard the affidavits since the practice of permitting an affidavit to change the docket date would create confusion in docketing of judgments.

Our holding may appear harsh; yet in *Washington v. United States, supra*, the notice of appeal was filed but one day late. Were we to entertain appeals whose notices were filed one day late, in the absence of circumstances warranting a relaxation of the rule,[3] there would be no rationale for not allowing appeals whose notices were filed two days or five days late. Mechanical rules "must be mechanically applied in order to avoid [the] uncertainties" that arise when exceptions are made. *United States v. Indrelunas*, 411 U.S. 216, 222 (1973).

APPEAL DISMISSED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

[3] While Brainerd offers no excuse for late filing, he requests a remand for the district court to determine "whether any untimeliness was excusable. . . ." We refuse. *Evans v. Jones*, 366 F.2d 772 (4th Cir. 1966); and *Reed v. People of State of Michigan*, 398 F.2d 800 (6th Cir. 1968), cited by Brainerd, are inapposite, since in both of those cases the possible "excusable neglect" of appellants was apparent in the record.

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